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91-1234

No. _____

Supreme Court, U.S.
FILED
JAN 31 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a State Law Cause of Action in Tort Vests as a "Property" Interest Under the Fourteenth Amendment Due Process Clause at the Time the Cause of Action Accrues, or at Some Later Time, Such as When a Favorable Judgment on the Merits has Become Final and Unreviewable?

II. Whether the Fourteenth Amendment Due Process Clause Prevents a State Appellate Court From Depriving a Tort Litigant of Her Cause of Action by Retroactively Applying a State Supreme Court Ruling Which, Nearly Three Years After the Plaintiff Won Her Suit, Shortened the Applicable Limitations Period?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dolores J. Richards, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.

OPINION BELOW

The opinion of the Court of Appeals for the Fourteenth District of Texas in *Liberty Mutual v. Richards* is reported at 810 S.W.2d 232 (Tex. App.—Houston [14th Dist.] 1991, writ denied). *See* Appendix, 1a. The court denied Richards' motion for rehearing by unpublished order dated May 2, 1991. *See* Appendix, 7a. The Texas

Supreme Court denied Richards' application for writ of error without opinion on September 18, 1991. *See* Appendix, 9a. Finally, the Texas Supreme Court denied Richards' motion for rehearing of the application for writ of error by order dated November 6, 1991. *See* Appendix, 10a.

JURISDICTION

Richards invokes this Court's jurisdiction under 28 U.S.C. § 1257(3), as she asserted below and asserts here a deprivation of rights secured by the United States Constitution, specifically the Fourteenth Amendment Due Process Clause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution. It also involves Sections 16.003 and 16.051 of Texas Civil Practice and Remedies Code. The texts of these provisions appear in the Appendix at 11a.

STATEMENT OF THE CASE

This case involves a state appellate court's reversal of a plaintiff's judgment, nearly three years after that judgment, based on the retroactive application of a state supreme court ruling which shortened the applicable limitations period, despite the fact that the plaintiff's suit was timely according to the limitations period in effect at the time of her lawsuit and winning judgment.

Petitioner Dolores J. Richards was receiving workers' compensation benefits (for a work-related injury that required surgery) until January 12, 1983, when Liberty Mutual Fire Insurance Company terminated those benefits. *See Liberty Mutual Fire Insurance Co. v. Richards*, 810 S.W.2d 232, 233 (Tex. App.—Houston [14th Dist.] 1991), *reproduced in* Appendix, 1a-4a. Mrs. Richards filed suit to establish that Liberty Mutual wrongfully ter-

minated her benefits; this contract dispute was resolved with Richards winning a jury verdict in January, 1985. *See* Appendix, 2a. That winning judgment became final and unreviewable on April 30, 1986. *Id.* On March 7, 1986, shortly *before* her first judgment on the contract dispute became final and unreviewable, Mrs. Richards filed a second lawsuit (a tort suit) against Liberty Mutual, claiming that Liberty Mutual terminated her benefits in bad faith, thereby breaching its duty of good faith and fair dealing to insureds. *Id.*

In January of 1987, while Mrs. Richards' suit was still early in the discovery phase, the Texas Supreme Court, in *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex. 1987), unanimously decided that the limitations period applicable to a bad faith suit was two years, with the period to begin running at the time the underlying contract suit was ultimately resolved. Thus, according to *Arnold*, Richards' suit alleging bad faith termination of benefits was actually filed *prior* to the time that the limitations period began to run.[1]

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[1] Although Richards did not "rely" on *Arnold* in filing her suit, there was, of course, substantial reliance on *Arnold* by the parties, the attorneys, and the court in continuing with extensive discovery, jury selection, trial, etc., on the basis of *Arnold's* assurance that the suit was timely. Moreover, even in filing suit, Richards justifiably relied on Texas law. Texas law has both a two-year statute of limitations and a four-year statute of limitations. *See* Appendix, at 11a, *reproducing* Sections 16.003 and 16.051 of Texas' Civil Practice and Remedies Code. The two-year statute of limitations, by its terms, expressly appeared inapplicable, because it did not mention actions based on a breach of the duty of good faith and fair dealing, or any actions synonymous therewith. The general catch-all four-year statute of limitations therefore was the apparent limitations period prior to the decision in *Arnold*. (This is discussed in more detail at note 6 of this petition). Furthermore, *Arnold's* 9-0 decision drew on analogous areas of state law wherein bad faiths claims against insurance companies were held to accrue only at the time that related underlying lawsuits were ultimately resolved. *See Arnold*, 725 S.W.2d at 168. Surely litigants were also

Relying on the *Arnold* decision, the court and the parties proceeded to trial, where plaintiff won a jury verdict on the merits. 810 S.W.2d at 233, *reproduced at* Appendix, 2a. At that trial, Liberty Mutual's own claims manager testified that the justification given to Texas' Industrial Accident Board for termination of Mrs. Richards' benefits was false. *Id.* Not surprisingly, the jury found that Liberty Mutual did not have a reasonable basis for termination of Richards' workers' compensation benefits and awarded her $80,000.00 for mental anguish. *Id.* Further finding that Liberty Mutual's conduct was the result of conscious indifference to Richards' rights and welfare, the jury also awarded $3.5 million in exemplary damages. *Id.*

Liberty Mutual appealed, raising some fifty alleged points of error. Although the trial court entered a judgment for Richards on July 19, 1988, the Court of Appeals did not render an opinion until nearly three years later, on April 4, 1991. *See* Appendix, 1a. This delay was significant because, after briefing and oral argument in the Liberty Mutual appeal, the Texas Supreme Court, in *Murray v. San Jacinto Agency*, 800 S.W.2d 826 (Tex. 1990), overruled its limitations holding in *Arnold* by a 5-4 decision, changing the method by which the two-year limitations period is calculated. According to the Texas Supreme Court in *Murray*, the two-year statute of limitations should begin to run at the time the insurance company denies coverage (or, in this case, the time the insurance company terminates benefits) rather than at the later time when plaintiff has ultimately won the underlying contractual dispute and proved coverage. *Murray*, 800 S.W.2d at 829. The Fourteenth Court of Ap-

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justified in relying on these analogous areas of limitations precedent. It is also important to note that Richards can in no way be seen to have sat on her rights, due to the fact that she anticipated a tort cause of action that, at the time of her filing suit on March 7, 1986, the Texas Supreme Court had not yet recognized as a cause of action. Recognition of such a tort came in *Arnold*, on January 28, 1987. *See Arnold*, 725 S.W.2d 165, 167 (Tex. 1987).

peals then reversed Richards' judgment, applying the *Murray* decision retroactively and finding that her suit was time-barred! *Liberty Mutual*, 810 S.W.2d at 234, *reproduced at* Appendix, 3a, 4a.

Richards filed a motion for rehearing, arguing that the retroactive application of the new limitations ruling in *Murray* violated her Fourteenth Amendment right to due process of the law. *See* Appendix, 5a-6a. That motion for rehearing was denied, without opinion. *See* Appendix, 7a. The motion for rehearing was, of course, the first opportunity for Richards to raise the federal due process issue, since there were no due process issues implicated until the Court of Appeals retroactively applied *Murray* to unfairly deprive Richards of her "property" interest in the tort cause of action. The federal due process issue was raised again in a second motion for rehearing, which was also denied without opinion. *See* Appendix, 8a. Richards filed an Application for Writ of Error with the Texas Supreme Court. That application was denied, again without opinion. *See* Appendix, 9a. Richards then filed a Motion for Rehearing of the Application for Writ of Error, which the Texas Supreme Court also denied without opinion on November 6, 1991. *See* Appendix 10a. Richards reargued the federal due process violation to the Texas Supreme Court.

The ultimate result in this case is consistent with federal due process principles *only if*: (1) Mrs. Richards' tort cause of action (and subsequent judgment) was not "property" for due process purposes; or (2) any deprivation of property caused by the retroactive application of *Murray*'s limitations ruling survives due process scrutiny. Each of these issues is significant, undecided, and directly presented by the current case. Moreover, the first issue has generated a significant split in the lower courts, with some courts deciding the issue in a manner fundamentally inconsistent with an analogous line of this Court's due process precedent.

REASONS FOR GRANTING THE WRIT

I. The Issue of When a Tort Cause of Action Vests as a "Property" Interest Protected by the Fourteenth Amendment Due Process Clause Has Generated a Deep Split Among the Lower Courts, Has Been Resolved by Several Courts in a Manner Fundamentally Inconsistent with Analogous Supreme Court Precedent, and Is an Important yet Unresolved Federal Question Directly Presented by This Case.

The Fourteenth Amendment prohibits states from depriving individuals of life, liberty, or property without due process of law. The hallmark of "property," according to the Court, is an individual entitlement grounded in state law. *Logan v. Zimmerman*, 455 U.S. 422, 430 (1982); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court has traditionally held that the Due Process Clause protects civil litigants, including plaintiffs who seek to redress grievances in the courts. *Logan*, 455 U.S. at 429. In other words, a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. *Id.* at 428-429 (*citing Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 309 (1950)). Although the "property" interest in *Logan* was created by a state statute, there is no requirement that the cause of action be statutory in order to receive due process protection. For example, in *Coombs v. Getz*, 285 U.S. 434, 448 (1932), the Court ruled that a cause of action sounding in contract falls within the protection of the Fourteenth Amendment Due Process Clause. And, in *Martinez v. California*, 444 U.S. 277, 281-82 (1980), the Court assumed that a cause of action in tort (wrongful death) is a species of "property" protected by the Due Process Clause. With respect to tort causes of action, the Court in *Logan* left little doubt that such claims are indeed "property." *See Logan*, 455 U.S. at 430 n.5.

The lower courts have not seriously questioned whether a cause of action in tort creates "property"; rather, many

state courts and federal courts of appeals have questioned, and disagreed about, *when* that property interest "vests." There are two views as to when a cause of action in tort vests as "property" for Due Process purposes. One view is that a cause of action in tort does not become a vested property interest until the plaintiff has won a final and unreviewable judgment. Virtually all the federal appellate courts deciding the issue have adopted this "final victory" approach. *See, e.g., Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell v. American Cyanide Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Konizeski v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987). This view is shared by at least one state supreme court. *See Clausell v. Hobart*, 515 So.2d 1275, 1275-1276 (Fla. 1987).

The alternative view is that the property interest vests at the time the cause of action accrues—i.e., upon the occurrence of the facts which gives rise to the tort suit. Under this view, the cause of action itself is property, even prior to the litigant winning a final and unreviewable judgment. Virtually all of the state supreme courts interpreting this point of federal constitutional law have adopted, either expressly or implicitly, the "accrual" view. *See, e.g., Crier v. Whitecloud*, 496 So.2d 305, 308 (La. 1986); *Black v. Ball Janitorial Service, Inc.*, 730 P.2d 510, 514 (Ok. 1986); *Williams v. Hofley Manufacturing Co.*, 424 N.W.2d 278, 282 (Mich. 1988). State appellate courts have also been uniformly adopting the "accrual" view. *See, e.g., Brandt v. Brandt*, 468 N.W.2d 769, 772 (Wis. Ct. App. 1991); *Snoddy v. Teepak, Inc.*, 556 N.E. 2d 682, 685 (Ill. Ct. App. 1990); *Sisson v. Douglas County School District*, 351 S.E.2d 272, 274 (Ga. Ct. App. 1986). At least one recent federal court of appeals decision also recognizes that a wrongful death action constitutes a property interest even before it is reduced to a final winning and unreviewable judgment. *See Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441,

444 (5th Cir. 1991). Thus, in addition to a major split between federal and state courts, there is even a small split in the federal circuits on the issue of when a tort claim becomes "property."

Not only are the lower courts sharply split over this important question of federal constitutional law, but the view held by the majority of the federal circuits (the final unreviewable victory view) is in direct conflict with *Logan v. Zimmerman* and other decisions of this Court interpreting "property" for due process purposes. A plain reading of *Logan* reveals that it is the *cause of action itself*—i.e., the right of a litigant to bring an action—that constitutes "property" protected by the Due Process Clause. *See Logan*, 455 U.S. at 429. Indeed, the essence of due process is the opportunity to be heard, which cannot depend on whether, once heard, the individual is ultimately entitled to victory. The Court in *Logan* speaks of the "property" of "potential litigants" not "winning litigants." *See* 455 U.S. 422, 429-30. The Court emphasized that the Due Process Clause protects "plaintiffs *attempting* to redress grievances," not merely plaintiffs who have *successfully* redressed grievances. 456 U.S. at 429 (emphasis added).

The courts which have adopted the "final victory" approach to the vesting of tort claims as Due Process "property" are confusing litigants' property interest in *damages* ultimately won with their property interest in the *cause of action* itself. While the Due Process Clause certainly prohibits a state from depriving an ultimately victorious plaintiff of his monetary damages without due process, so too it prohibits states from earlier depriving him of his cause of action without due process (or, as in the present case, from depriving the litigant of both her victorious judgment, albeit a reviewable one, *and* her cause of action without due process). Although damages are perhaps more tangible property than a simple cause of action, the Supreme Court has expressly stated that *intangible* property, such as a cause of action, is also

protected by the Due Process Clause. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988). At the time the cause of action accrues, the desire for *monetary damages* may be a mere expectation of future benefit and thus not a "vested" property interest, but the *cause of action* is not a mere expectation. It has vested; and it "entitles" litigants to use the state's adjudicatory procedures (*fair* procedures) in an attempt to win monetary damages.

The "final victory" view is not only in conflict with one line of Supreme Court precedent, it is based on a misreading of an entirely separate line of Supreme Court cases which hold that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *See Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (*citing New York Central R.R. Co. v. White*, 248 U.S. 188, 198 (1917) and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 n.32 (1978)); *Koniszeski v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987) (*citing* the same Supreme Court cases); *Eddings v. Volkswagenwerk*, 835 F.2d 1369, 1374 (11th Cir. 1988) (*citing* the same Supreme Court cases).

Significantly, neither *New York Central* nor *Duke Power* dealt with the retroactive application of a rule change which would extinguish or, in any way, affect a cause of action. *See New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) (the Court applied the workers' compensation law in effect at the time the cause of action accrued); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (no cause of action had accrued even at the time of Supreme Court review). Thus, *New York Central* and *Duke Power* stand only for the unremarkable proposition that persons generally (i.e., *those without a cause of action*) have no vested property interest in the continued vitality of any rule of law. And holding that persons generally have no property interest in the continued existence of any given

law does not foreclose holding, as the Court did in *Logan*, *Martinez*, and *Tulsa Professional*, that a person with a cause of action *does* have a property interest which can be deprived only with due process. Yet, many lower courts are reading *New York Central* and *Duke Power* in a way that obliterates the central teaching of *Logan*—that a cause of action, in and of itself, is property protected by the Due Process Clause.

The present case is a good vehicle to resolve the issue of when a tort claim becomes a vested property interest. Not only is the issue directly implicated on the facts of the present case, but it is outcome-determinative. If tort claims do not vest as property until a final unreviewable victory, then the petitioner has no "property" and thus no due process objection to the state appellate court's extinguishment of her claim through the retroactive application of a new rule for calculating the limitations period. On the other hand, if a tort cause of action vests at the time the cause of action accrues, or even at the time of receiving a favorable verdict on the merits, then the petitioner has "property" and the Texas appellate court's arbitrary extinguishment of her cause of action, by retroactively applying a "new" limitations ruling, constitutes an unconstitutional deprivation (as demonstrated by petitioner's argument on the second issue). In short, while the ultimate result in this case is consistent with due process if tort causes of action do not become vested property interests until final unreviewable victory, *that* is a view of "property" which is fundamentally inconsistent with *Logan v. Zimmerman*.

The magnitude of this issue for all state and federal tort litigants and potential litigants is apparent. If tort litigants have no property interest until a final unreviewable victory, then there are no due process implications to a state's arbitrary denial of those litigants' access to the courts or, as in the present case, a state's arbitrary destruction of both a verdict on the merits and the underlying cause of action. Moreover, the substantial appellate

delays occasioned by overburdened state judicial systems increases the chances that laws regarding filing and procedure will change between judgment and appellate review. For example, in the present case, the trial court entered a judgment for the petitioner on July 19, 1988, and the court of appeals did not render an opinion until nearly three years later! (April 4, 1991). By that time, of course, the method by which the applicable limitations period was to be calculated had changed, and the appellate court retroactively applied the "new" rule to deprive the petitioner of her judgment (and, indeed, her entire cause of action). Of course, no matter how extreme the delay, or how unfair the retroactive application of the "new" law, there are *no* due process implications in those jurisdictions which adhere to the "final victory" view of tort litigant "property." [2]

In sum, the issue of when a tort cause of action vests as "property" has generated a significant split among the lower courts on an important and unresolved federal question which potentially affects thousands of civil litigants [3] and is directly presented by this case. Moreover,

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[2] In many cases, though certainly not here, retroactive application of changes in the law may be completely consistent with due process, even if such application reverses an initial victory. For example, although a change in a procedural filing requirement, if applied retroactively, may completely *destroy* a cause of action, a change in substantive law may simply *define* that cause of action. *See Logan v. Zimmerman*, 455 U.S. at 433. This petition's second issue demonstrates why the retroactive application of a *limitations* decision violates due process. With respect to the preliminary "vesting" issue, we argue only that the retroactive application of such laws in a manner that destroys a cause of action, even one that has not been reduced to a final unreviewable winning judgment, should at least be subject to due process scrutiny.

[3] The "vesting" issue takes on even added significance in light of the increasing pressure on state legislatures to cap damage awards. Are such caps permissible? Can they be retroactively applied to those litigants whose tort causes of action have already accrued? To those litigants who have already won a judgment in excess of

many lower courts are adopting a view which is contrary to closely related Supreme Court precedent, by confusing two independent lines of Supreme Court authority. For all these reasons, this Court should grant certiorari, resolve this issue, and reverse the decision of the Fourteenth District Court of Appeals of Texas.

II. The Federal Constitutional Implications of a State's Destruction of a Litigant's Cause of Action Through the Retroactive Application of a Judicial Ruling Which Effectively Shortens the Applicable Limitations Period (Particularly the Process that Is Due Litigants Prior to Such a Deprivation) Is an Important and Undecided Federal Question Which Is Directly Presented by This Case; and This Court in Recent Opinions Has Given Mixed Signals Regarding the Correct Resolution of This Issue.

This Court has decided—and recently affirmed—that *federal* judicial decisions affecting limitations periods should be applied only prospectively. *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2333, 2339 (1990). This Court, however, has not decided whether the Fourteenth Amendment Due Process Clause prevents *state* courts from retroactively applying *state* judicial decisions that effect changes in the limitations period to litigants who had timely filed under the "old" period. In short, the Court has decided this retroactivity issue as a matter of *federal policy*, but not as a matter of *federal constitutional law*. Consequently, this Court has never decided the process that is due litigants before a state may destroy their "property" through the retroactive application of judicial rulings which effectively shorten limitations periods.

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the cap, but whose cases are still pending on appeal? Resolution of the "vesting" issue carries tremendous significance not only for this petitioner, but many other current and future tort litigants.

The general federal rule on retroactivity of judicial decisions is that appellate courts should decide cases in accordance with the law existing at the time of decision. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49 (1801). In other words, the general rule for judicial decisions is retroactivity. The Court, however, has recognized an exception to the general rule in cases where retroactivity would result in a "manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696, 717 (1974); *Gulf Offshore*, 453 U.S. at 486 n.16. And the Court has consistently found "manifest injustice" in the retroactive application of limitations decisions. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107-109 (1971); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *American Trucking Association, Inc. v. Smith*, 110 S.Ct. 2323, 2339 (1990). Just last term, while generally cutting back on *Chevron Oil's* non-retroactivity analysis, this Court did not disturb *Chevron Oil's* doctrine of non-retroactive application of decisions affecting statutes of limitation. *See James Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2446, 2448 (1991).

It seems self-evident that there are due process ramifications when a state appellate court's retroactive and "manifestly unjust" application of a new limitations period extinguishes a litigant's property interest. It is difficult to think of a term running more fundamentally counter to "due process" than "manifest injustice." Indeed, this Court in *Logan* emphasized that, while a state may elect not to confer a property interest, the adequacy of procedural safeguards for deprivation of such an interest, once conferred, must be analyzed in constitutional terms. 455 U.S. at 432. Nevertheless, a recent opinion of this Court creates some confusion on what seems to be a simple issue.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), the Court resolved an unsettled limitations issue and applied its ruling retroactively, thereby barring the *Lampf* litigant's lawsuit. *Id.* at 2782 (retroactive application is implicit in Part IV of the Court's opinion). The Court did not discuss, in any manner, the due process ramifications of its decision. The Court did not mention or apply the well-settled "manifest injustice" standard. Nor did the Court purport to overrule *Chevron Oil*, *Saint Francis College*, or *American Trucking*.[4] In Justice O'Connor's spirited dissent, she emphasized that *Chevron Oil* and *Saint Francis College* are based on fundamental notions of due process—i.e., that it violates due process to apply a limitations period retroactively and thereby arbitrarily deprive a party of his day in court. *Lampf*, at 2786 (O'Connor, J., dissenting). She based her opinion, in part, on the Court's determination that the retroactive application of a judicial ruling that changes limitations law is "manifestly inequitable." *Id.*, *citing Saint Francis College v. Al-Kazraji*, 481 U.S. 604, 608-609 (1987). Justice O'Connor also noted that none of the cases on which she was relying had been overruled. *Lampf*, at 2787 (O'Connor, J., dissenting).

A definitive resolution of this issue would not only resolve the tension between *Chevron* and *Lampf* (as well as the tension between *Logan* and *Lampf*), it would ad-

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[4] It is possible that the retroactivity in *Lampf* had no due process ramifications because the limitations issue in *Lampf*, unlike the one in the present case, was clearly unsettled throughout the entire course of the litigation. *See Lampf* at 2777. Consequently, there was no settled precedent which the Court overturned or upon which the plaintiff, *in any sense*, may have justifiably relied. It is also possible that there was no manifest injustice caused by the retroactive application, since it appeared that the plaintiff did not timely file even under the more generous limitations period that he argued was applicable. Or, perhaps *Chevron* has been silently overruled. The opinion just does not say.

vance the orderly and efficient operation of the civil justice system, so that the valuable time of courts, lawyers, and juries is not wasted unnecessarily. And, it is especially important to civil litigants that this court determine the process that is due them before a state may "retroactively" destroy their "property."

In this case, many persons justifiably relied on the *Arnold* ruling; and the attendant waste of resources is apparent. Although Richards did not rely on *Arnold* in *filing* the suit (because *Arnold* was decided subsequent to filing the suit), the present case does demonstrate substantial reliance on *Arnold*, not only on the part of the litigants, but also on the part of the court, the lawyers, the jury, the witnesses, etc. Both Mrs. Richards and Liberty Mutual conducted discovery in this case between March, 1986 and May, 1988. Extensive discovery was conducted subsequent to the Texas Supreme Court's decision in *Arnold*, which signalled the litigants, the lawyers, and the court, that Mrs. Richards' lawsuit was timely. In fact, during that period, Judge Wood conducted several hearings on discovery matters for which the lawyers spent hours in preparation. In the summer of 1988, again in reliance on *Arnold*, the judge, the twelve-member jury, the lawyers, and the witnesses, performed their duties during a trial which lasted nearly three weeks.

Even in *filing*, Mrs. Richards justifiably relied on what the pre-*Arnold* limitations law reasonably appeared to be.[5]

---

[5] The Fourteenth Court of Appeals' opinion incorrectly assumes that, before *Arnold*, the controlling limitations law for Mrs. Richards' claim was not only settled, but contained in the Texas Supreme Court case of *Robinson v. Weaver*. *See Liberty Mutual v. Richards*, 810 S.W.2d 232, 233-34 (*citing Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977), *reproduced in* Appendix, 2a-3a. *Robinson*, of course, was decided ten years before the Court in *Arnold* even recognized that a claim such as Mrs. Richards' was a viable cause of action. Moreover, *Robinson* was a medical malpractice case and in no way discussed claims such as Mrs. Richards'. 550 S.W.2d at

Indeed, *Arnold* itself relied on preexisting analogous case law to decide, 9-0, that the two-year statute of limitations begins running when the underlying contractual suit is ultimately resolved. 725 S.W.2d at 168. Surely, if nine justices decide to rely on that analogous body of law, a litigant is similarly entitled to rely. Moreover, the pre-*Arnold* limitations period for Mrs. Richards' claim reasonably appeared to be the state's four-year statute of limitations (under which Richards' suit would also have been timely) rather than the two-year limitations period.[6]

---

19. *Robinson* merely stated a general rule affecting limitations periods—i.e., that a cause of action generally accrues at the time facts come into existence that authorize a claimant to seek a judicial remedy. 550 S.W.2d at 19. *Robinson* in no way decided at what point, with respect to any given cause of action, those underlying facts exist. It was not until ten years later in *Arnold* that the Texas Supreme Court decided that, in a bad faith claim against an insurance company, the limitations clock does not start ticking until there has been *both* a denial of coverage (or termination of benefits) *and* a final resolution of the underlying contractual dispute. 725 S.W.2d at 168. Prior to the ruling in *Arnold*, neither *Robinson* nor any other case had settled the law to the contrary. Indeed, since *Arnold* reached its unanimous conclusion by relying on an analogous area of state limitations law, 725 S.W.2d at 168, it was *Arnold* and no other case that reflected "settled" law prior to the *Arnold* holding in 1987.

[6] Texas' two-year statute of limitations expressly applies to five causes of action which arise out of injuries to property rights, and one cause of action for "personal injury." *See* section 16.003(a), Texas Civil Practice and Remedies Code (Vernon 1986), *reproduced in* Appendix, 11a. Texas' four-year statute of limitations provides that "[e]very action for which there is no express limitations period . . . must be brought not later than four years after the day the cause of action accrues." Section 16.051, Texas Civil Practice and Remedies Code (Vernon 1986), *reproduced in* Appendix, 11a. A cause of action for the breach of duty of good faith and fair dealing is nowhere mentioned in section 16.003. We are not arguing that this Court should decide which of two state statutes of limitations applied to suits filed before the Texas Supreme Court's decision in *Arnold*. We point this out only to demonstrate what the limitations period reasonably appeared to be, a factor bearing on the quality of notice which, as argued in the text above, is a central aspect of due process.

In any event, even though the appropriate pre-*Arnold* limitations period was necessarily a question of state law, the clarity of that law certainly bears on the quality of notice provided to a litigant regarding the time within which she must file suit. And the quality of the notice provided to a civil litigant, whose cause of action constitutes a vested property interest, is itself a seminal due process issue. Moreover, Mrs. Richards can hardly be charged with sitting on her rights. She anticipated the cause of action for bad faith termination of her benefits, filing suit even before the Texas Supreme Court, in *Arnold*, recognized that a breach of an insurer's duty of good faith to insureds constitutes a viable cause of action. Of course, a new cause of action is not available to every person ever harmed by such a tort, whether five years ago, ten years ago, etc. But due process principles surely require some "grandfathering" before retroactively applying "new" limitations periods that destroy the property of litigants who have successfully anticipated "new" causes of action and whose cases are pending (or, in Richards' case, litigants whose cases have proceeded to a victorious judgment).

In sum, the reliance on *Arnold*'s apparently settled law, the retroactively applied changes in such law, and the misleading nature of the limitations law in effect at the time Richards filed her suit, are all part and parcel of the same due process issue—i.e., whether the state's adjudicatory procedures provided due process to Mrs. Richards prior to depriving her of her property interest. At a minimum, due process should require some "grandfathering" in those cases where the litigants, the court, the lawyers, etc., have relied in some substantial manner on apparently settled limitations law, as well as requiring some "grandfathering" for litigants who successfully anticipate state supreme court recognition of new causes of action and, in deciding what the applicable limitations period is, justifiably rely on the plain language of statutes and seemingly on-point state supreme court precedent. For

all the foregoing reasons, this Court should grant certiorari, resolve the apparent tension between *Chevron* and *Lampf*, and determine the process that is due litigants prior to the state's destruction of their "property" through the retroactive application of judicial rulings which effectively shorten limitations periods.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges the Court to grant a writ of certiorari to review the opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.

Respectfully submitted,

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Dated: January 31, 1992

APPENDIX

APPENDIX

COURT OF APPEALS OF TEXAS
HOUSTON (14TH DIST.)

No. C14-88-966-CV

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Appellant,

v.

DOLORES J. RICHARDS,
Appellee.

April 4, 1991

Rehearing Denied May 2, 1991

Ann Moore, Frank M. Bean, Houston, for appellant.

Kirk Purcell, A. Reagan Clark, David M. Gunn, Houston, Kenneth D. McConnico, Webster, for appellee.

Before PAUL PRESSLER, CANNON and ELLIS, JJ.

OPINION

ELLIS, Justice.

This appeal arises from a jury verdict in favor of appellee in her suit against appellant [Liberty Mutual] for breach of its duty of good faith and fair dealing to its insureds. Because the Texas Supreme Court has once again altered the law concerning the statute of limitations in cases against insurance companies, we must reverse.

Liberty Mutual terminated appellee's worker's compensation benefits on January 12, 1983. It argues that the

termination was reasonable because the decision was based on medical opinions. However, the record establishes that the opinions on which Liberty Mutual claims its decision was based were not received until after the decision to terminate benefits had been made. Liberty Mutual filed the required A-2 form with the Industrial Accident Board stating the reason for suspension of benefits was "[claimant] has been release[d] from doctor['s] care since 11/19/82." Liberty Mutual's own claims manager testified that the justification given to the Industrial Accident Board was false. The jury found that Liberty Mutual did not have a reasonable basis for terminating appellant's workers' compensation benefits and awarded appellant $80,000 for mental anguish. Finding that Liberty Mutual's conduct was the result of conscious indifference to appellant's rights and welfare, the jury also awarded $3.5 million in exemplary damages.

The parties in this case were faced with the uncertainty that necessarily accompanies the pursuit of emerging areas of law; however, this case was further complicated by the supreme courts' vacillating rulings on when the two-year statute of limitations begins to run on actions for an insurer's breach of its duty of good faith and fair dealing. For purposes of application of the statute of limitations, a cause of action generally accrues at the time facts come into existence that authorize a claimant to seek a judicial remedy. *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex.1977). That general rule was the controlling law at the time appellant's benefits were terminated in January of 1983.

Appellant received a favorable judgment in her contractual dispute with Liberty Mutual in January of 1985. That judgment became final April 30, 1986. Cases seeking recognition of a cause of action against insurers for breach of a duty of good faith and fair dealing were pending in the judicial system when appellant filed this suit on March 7, 1986. Following the general rule as stated

in *Robinson*, which was then controlling, appellant's cause would have been barred by limitations.

While this suit was in the discovery process, the supreme court decided *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex.1987). *Arnold* altered the general rule by holding that, "the statute of limitations does not begin to run on a good faith and fair dealing claim until the underlying insurance contract claims are finally resolved." 725 S.W.2d at 168. Because of the *Arnold* holding, this case proceeded to trial and a judgment in favor of appellee.

Shortly before this appeal was submitted, the supreme court once again altered the application of the two-year statute of limitations. *Murray v. San Jacinto Agency*, 800 S.W.2d 826 (Tex.1990), "modified" *Arnold*. The Texas Supreme Court held, "[o]ur limitations holding in *Arnold* is not consistent with the rule that limitations commences at the time facts come into existence which authorize a claimant to seek judicial remedy." 800 S.W.2d at 829, *citing Robinson*, 550 S.W.2d at 19. The court held that the injury producing event is the denial of coverage, and that "[l]imitations on a first party claim appropriately begins to run at denial, not the date a separate suit to determine coverage under the contract is resolved." 800 S.W.2d at 829. Under the *Murray* holding, appellant's case is once again barred by limitations.

The supreme court did not indicate whether it intended to limit the application of either *Arnold* or *Murray*, or whether it intended full retroactivity. The general rule is that a decision of a supreme court is to be retroactive in its operation. *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). Just as *Arnold* was applicable because this case was then pending in the judicial system, absent any contrary indication from the supreme court the *Murray* holding must control our disposition in this case now.

Although we may not agree with the Texas Supreme Court's ruling, as an intermediate appellate court we are bound to follow it. We must sustain Liberty Mutual's fifty-seventh point of error that appellant's cause of action was barred by limitations as a matter of law. Because of our disposition of this point of error, it is unnecessary to address the remaining points.

The judgment of the trial court is reversed.

PAUL PRESSLER, J., not participating.

[Excerpts from Motion for Rehearing and Request for Oral Hearing En Banc]

No. 14-88-00966-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Appellant,

v.

DOLORES J. RICHARDS,
Appellee.

Appealed from the 127th Judicial District Court
of Harris County, Texas

APPELLEE'S MOTION FOR REHEARING
AND REQUEST FOR ORAL HEARING EN BANC

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ORAL ARGUMENT REQUESTED

* * * *

IV. POINT OF ERROR FOUR: THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS BARRED MRS. RICHARDS' CAUSE OF ACTION BECAUSE THE RETROACTIVE APPLICATION OF A NEW STATUTE OF LIMITATIONS STANDARD DEPRIVED MRS. RICHARDS OF THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY THE TEXAS CONSTITUTION.

* * * *

PRAYER FOR RELIEF

For these reasons, Dolores J. Richards respectfully requests that this Court grant her Motion for Rehearing and affirm the judgment of the trial court. Additionally, Appellee seeks to recover costs of Court and prays for any further relief to which she may show herself to be entitled. Additionally, Appellee respectfully requests that the Court of Appeals order the publication of its opinion that was issued on April 4, 1991 be published.

Respectfully submitted,

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May 2, 1991

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RE: Case No. 14-88-00966-CV
Trial Court Case No. 86-14004

STYLE: Liberty Mutual Fire Insurance Company
V: Richards, Dolores J.

Counsel:

Please be advised that, on this date, the Court OVERRULED appellee's(s') motion for rehearing in the above cause.

Fuhther, application for writ of error, if any, must be submitted on or before Monday, June 3, 1991.

MARY JANE SMART
Clerk

By: /s/ Charlene Mitchell
Chief Deputy

FOURTEENTH COURT OF APPEALS
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May 16, 1991

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RE: Case No. 14-88-00966-CV
Trial Court Case No. 86-14004

STYLE: Liberty Mutual Fire Insurance Company
V: Richards, Dolores J.

Counsel:

Please be advised that today, the Court DENIED appellee's(s') second motion for leave to file motion for rehearing in the above cause.

MARY JANE SMART
Clerk

By: /s/ Charlene Mitchell
Chief Deputy

THE SUPREME COURT OF TEXAS
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September 18, 1991

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RE: Case No. D-1178

Style: DOLORES J. RICHARDS v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Courtland Crocker
COURTLAND CROCKER
Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
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John T. Adams, Clerk

November 6, 1991

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RE: Case No. D-1178

Style: DOLORES J. RICHARDS v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Courtland Crocker
COURTLAND CROCKER
Deputy

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Civil Practice and Remedies Code (Vernon 1986):

§ 16.003. Two-Year Limitations Period

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

§ 16.051. Residual Limitations Period

Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

Supreme Court, U.S.
FILED
APR 3 1992
OFFICE OF THE CLERK

(2)

No. 91-1234

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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April 6, 1992

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a claim that was not presented to the Texas Court of Appeals, the court to which a writ of certiorari is sought, or to the Texas Supreme Court.

2. Whether a litigant, whose cause of action is barred by application of a state Supreme Court ruling that changed the date on which the applicable statute of limitations commenced to run, has been deprived of Due Process of law within the meaning of the Fourteenth Amendment.

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II. While a cause of action is considered a "species" of property within the meaning of the Fourteenth Amendment, retroactive application of a change in the date from which the applicable statute of limitations runs is within the discretion of the state and does not implicate Due Process concerns. 9

III. Any tension between *Chevron* and *Lampf* or between *Logan* and *Lampf* cannot be resolved by considering the instant case because *Lampf* and *Chevron* were decided on federal policy grounds, not the constitutional ground on which Richards relies. 16

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No. 91-1234

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent, Liberty Mutual Fire Insurance Company ("Liberty Mutual"),[1] respectfully urges the Court to deny a writ of certiorari to review the judgment of the Texas Court of Appeals in this proceeding.

[1] The caption contains the names of all parties to the proceedings below. Affiliates of Respondent Liberty Mutual Fire Insurance Company whose identities are required to be disclosed by Supreme Court Rule 29.1 are: Liberty Northwest Insurance Corporation; Helmsman Management Service Northwest, Inc.; Liberty Mutual Property-Casualty Holding Corporation; Liberty Insurance Corporation; Liberty Life Assurance Company of Boston; Helmsman Management Service, Inc.; Liberty International Insurance Agency, Inc.; Liberty Mutual Insurance Company (U.K.) Ltd.; and Helmsman (Underwriting) Ltd.

JURISDICTION

Richards invokes the Court's certiorari jurisdiction pursuant to 28 U.S.C. §1257(a). However, since Richards failed to raise properly her Due Process challenge in the courts below, the Court should deny certiorari for want of a properly presented federal question.

STATEMENT OF THE CASE

This is a worker's compensation insurance case. Petitioner Dolores J. Richards challenges a change in the rule governing commencement of limitations for the Texas cause of action she asserted. No constitutional or other federal rights are implicated.

After Richards incurred on-the-job injuries, Liberty Mutual provided her with worker's compensation benefits, but terminated those benefits on January 12, 1983. *See Liberty Mutual Fire Insurance Co. v. Richards*, 810 S.W.2d 232, 233 (Tex. App. 1991); *reproduced in* Appendix to Richard's Petition for Writ of Certiorari (hereafter "Richards Appendix") at 1a-4a. Richards' worker's compensation claim resulted in a judgment in her favor, which became final on April 30, 1986. *Liberty Mutual v. Richards*, 810 S.W.2d at 233; Richards Appendix at 2a.

On March 7, 1986, prior to the conclusion of her worker's compensation case, but more than three years after Liberty Mutual terminated her disability payments, Richards filed the suit now brought for review to this Court, seeking damages against Liberty Mutual for breach of a duty of good faith and fair dealing ("bad faith") in the processing of her claim. *Liberty Mutual v. Richards*, 810 S.W.2d at 233; Richards Appendix at 2a; Appendix to this brief (hereafter "Appendix") at A1-A2. At that time, however, there was no recognized cause of action for "bad faith" in Texas.

Moreover, in *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977), the Texas Supreme Court had established long before Richards filed her claim that the two year limitations period for personal injury and other causes of action sounding in tort begins to run when the cause of action accrues, that is, when facts come into existence that authorize a claimant to seek a judicial remedy. *Id.*

In January, 1987, while this action was pending in state district court, the Texas Supreme Court recognized the tort of "bad faith" denial or termination of insurance benefits in the context of first party insurance. *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987). In *Arnold*, the court departed from the established rule of *Robinson*, holding that the two year limitations period governing bad faith claims would not begin to run until the underlying contract claims were finally resolved. *Id.* at 168. More than a year later, the Texas Supreme Court ruled that the tort of "bad faith" applied to the processing of worker's compensation claims, *Aranda v. Ins. Co. of N. America*, 748 S.W.2d 210, 212 (Tex. 1988), thus recognizing a theory similar to that Richards had been pursuing against Liberty Mutual.[2]

The action went to trial and, on July 19, 1988, judgment was entered on a jury verdict in favor of Richards for $3.58 million. *Liberty Mutual v. Richards*, 810 S.W.2d at 233. Liberty Mutual appealed, but on April 18, 1990, after both parties had filed opening briefs, the Texas Supreme Court corrected the anomalous limitations holding of *Arnold*. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990). The Court restored the applicability of the

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[2] It was thus the retroactive application of *Aranda* and *Arnold* that breathed life into Richards' claim five years after the conduct complained of took place, permitting the action to proceed to trial.

Robinson rule to bad faith law, holding that limitations begins to run on bad faith claims, as on most claims, when the cause of action accrues, that is, "when the wrongful act effects an injury". *Id.* at 829.

Richards' Supplemental Brief, filed in the Court of Appeals on May 21, 1990, the day before oral argument, was her first opportunity to brief for the court the Due Process implications of applying *Murray* retroactively.[3] Richards nonetheless failed to raise any federal constitutional issue in that brief. Appendix at A1-A7.

On April 4, 1991, the Court of Appeals issued its opinion reversing the judgment in favor of Richards on the ground that, under *Murray*, limitations barred Richards' cause of action since it was filed more than two years after Liberty Mutual's final termination of disability payments. *Liberty Mutual v. Richards*, 810 S.W.2d at 234. After denial of two Motions for Rehearing in the Court of Appeals, neither of which discussed or cited authority for a federal Due Process challenge, *see* Richards Appendix at 5a-6a, Richards applied for a Writ of Error to the Texas Supreme Court. In that Application, Richards failed to raise a Fourteenth Amendment challenge to the Court of Appeals' holding. Appendix at A8-A12. The Texas Supreme Court denied the Application with the notation "Writ Denied" on September 18, 1991. Richards Appendix at 9a. After the Texas Supreme Court denied Richards' Motion for Rehearing

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[3] Richards' claim that the Motion for Rehearing in the Court of Appeals presented her first opportunity to raise the federal Due Process issue is incorrect because the decision in *Murray*, announced even before the Court of Appeals heard oral argument in the instant case, clearly presented the possibility that Richards' cause of action would be barred if the Court of Appeals applied the new rule retroactively. Thus, Richards had the opportunity to raise her Due Process concerns well before the Court of Appeals ruled and Richards pursued rehearing.

on November 6, 1991, Richards Appendix at 10a, Richards filed her Petition for Writ of Certiorari on January 31, 1992.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Petition should be denied first because it fails to present a federal question. Under Texas law, Richards failed to preserve in the Texas appellate courts the federal constitutional issue now raised in her Petition. For this Court to assume jurisdiction, it must plainly appear that a federal question is necessarily presented. Richards' failure to present the issue below thus constitutes a sufficient, independent non-federal ground on which the judgment below rests, depriving this Court of jurisdiction.

The issue Richards raises is settled under early, unquestioned decisions of this Court that recently have been reaffirmed. Since statutes of limitations constitute remedial rather than fundamental rights, a state may apply decisions effecting changes in limitations to pending cases without offending Due Process. The lower court opinions Richards reads as creating a split of authority on the issue of "vesting" are, in fact, either consistent with this rule or factually so distinguishable as to be inapposite. Moreover, granting certiorari would have no beneficial effect on the administration of justice in the state or federal courts. Granting certiorari and reversing this case would, rather, create disruption and confusion with respect to a rule of law that has been settled since the late nineteenth century.

Contrary to Richards' contention, review of this case would give this Court no opportunity to address any tension among federal cases refusing, on policy rather than constitutional grounds, to retroactively apply intervening changes in law. Finally, the lack of any real unfairness to

Richards in terms of the degree of foreseeability of the change in the limitations trigger date further supports denial of her Petition.

Argument

I

Certiorari should be denied for lack of jurisdiction because Richards did not present her federal Due Process claim to the Texas Court of Appeals, the court to which a writ of certiorari is sought, or to the Texas Supreme Court.

Richards seeks a writ of certiorari to the Texas Court of Appeals on the ground that its ruling violated her right to Due Process of law. Richards never properly asserted this argument before the Texas Court of Appeals or in her application for writ of error to the Texas Supreme Court.

This Court has long adhered to the rule that, when reviewing state court decisions, it will not consider federal constitutional questions unless they were raised and "actually decided" in the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Beck v. Washington*, 369 U.S. 541, 553 (1962); *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961). "If both these do not appear on the record, the appellate jurisdiction fails." *Cardinale*, at 438. For this Court to assume jurisdiction, it must plainly appear that a federal question is necessarily presented, that is, that the judgment below could not rest on an independent non-federal ground sufficient to support it. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965); *Ferguson*, 365 U.S. at 572 n. 1. A sufficient independent non-federal ground is established if the state appellate courts from which the case

derives would consider the federal issue waived. *Beck*, 369 U.S. at 553. Since Richards' Due Process challenge was neither properly preserved nor "actually decided" at the state court level, the sole federal question Richards presents is not properly before this Court.

While Richards did insert a topic heading mentioning her federal rights in her Motion for Rehearing before the Court of Appeals, Richards Appendix at 6a, this heading is not sufficient under Texas law to present error to the Court of Appeals. An uninterrupted line of Texas cases establishes that error is waived before the Court of Appeals if not supported with either argument or authorities. *Martin v. Cohen*, 804 S.W.2d 201 (Tex. App. 1991, no writ); *Houston Lighting & Power v. Klein Independent School Dist.*, 739 S.W.2d 508, 514 (Tex. App. 1987, writ denied); *Brown v. Capital Bank, N.A.*, 703 S.W.2d 231, 234 (Tex. App. 1985, writ ref'd n.r.e.); TEX. R. APP. P. 74(f), 100(a), 131(f)(Vernon Supp. 1992). This Court has found that a similar failure to preserve an issue on appeal pursuant to state law undermines this Court's jurisdiction to review the issue on certiorari. *Beck*, 369 U.S. at 553-54. The Texas Court of Appeals' silence on the issue of Due Process in this case can be attributed only to Richards' failure to raise the point properly.

In addition, Richards failed to present her federal constitutional claim to the Texas Supreme Court. In order to be considered by the Texas Supreme Court, an issue must be assigned as error in the Application for Writ of Error. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977); *City of Deer Park v. State*, 275 S.W.2d 77, 84 (Tex. 1955); *U.S. v. Ray Thomas Gravel Co.*, 380 S.W.2d

576, 579 (Tex. 1964).[4] Richards did not assign as error to the Texas Supreme Court any violation of her Due Process rights. Appendix at A8-A12.

Moreover, had Richards raised such a challenge in her Application for Writ of Error, that contention was nonetheless not preserved before the Texas Supreme Court because she failed properly to raise it in her Motion for Rehearing before the Court of Appeals. The Texas Supreme Court has held repeatedly that it "cannot consider points of error that were not assigned on rehearing in the court of appeals." *Albright v. City of Houston*, 677 S.W.2d 487, 488 (Tex. 1984); *see also Smith v. Baldwin*, 611 S.W.2d 611, 618 (Tex. 1980); TEX. R. APP. P. 131(e) (Vernon Supp. 1992). Richards failed to raise her Due Process argument in her Motion for Rehearing in the Court of Appeals and in her Application for Writ of Error to the Texas Supreme Court. This failure constitutes an independent state law ground for denying the writ. *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1965).

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[4] While fundamental error may be considered even if not assigned in the Application, *McCauley v. Consolidated Underwriters*, 304 S.W.2d 265, 266 (Tex.1957)(jurisdictional defect is fundamental error), application of a limitations period, even if erroneous, cannot be considered error that is apparent on the face of the record and that "directly and adversely affects the interest of the public generally", as the Texas Supreme Court defines fundamental error. *City of Deer Park v. State*, 275 S.W.2d at 85; *Ramsey v. Dunlop*, 205 S.W.2d 979, 983 (Tex. 1947)(disputed election to public office as fundamental error).

II

While a cause of action is considered a "species" of property within the meaning of the Fourteenth Amendment, retroactive application of a change in the date from which the applicable statute of limitations runs is within the discretion of the state and does not implicate Due Process concerns.

The issue presented by this case is neither new nor controversial. Absent from Richards' Petition is any mention of the consistent line of precedent from this Court holding that, generally, retroactive operation of state court rulings, whether concerning statutes of limitations or other procedural requirements, is not repugnant to any provision of the U.S. Constitution. *See, e.g., Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) (reversal of prior decision by state court to prejudice of one party does not deprive that party of Due Process because parties were fully heard in state court); *Fleming v. Fleming*, 264 U.S. 29 (1924) (no impairment of right to contract); *Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895) (no Due Process violation); *see also* Annot., "Prospective or retroactive operation of overruling decision," 10 A.L.R.3d 1371, 1391-93, n. 19 (1966); Annot., "Retroactive or merely prospective operation of new rule adopted by court in overruling precedent - federal cases," 14 L.Ed.2d 992, 1002-1003 (1965). As Justice Cardozo wrote in *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), with respect to the issue of retrospective versus prospective operation of changes in the law:

> We think the Federal constitution has no voice upon the subject. A state in defining the

> limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. [W]e are not at liberty, for anything contained in the constitution. . . to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

Id. at 364-365. In short, "[s]ound or unsound, there is involved in [this choice] no denial of a right protected by the Federal Constitution". *Id.* at 364; *see also Linkletter v. Walker*, 381 U.S. 618 (1965) (retroactive operation of decision overruling another is a matter of judicial policy not constitutional compulsion).

Moreover, in a case not cited in Richards' Petition, this Court rejected a contention similar to that she advances. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the Court addressed a challenge to the Minnesota Supreme Court's retroactive application of a change in the date of commencement of a statute of limitations, effectively removing the limitations defense in that action and rendering the action timely. In rejecting the claim that this retroactive application violated the defendant's Due Process rights, the Court recognized that the issue had been settled since *Campbell v. Holt*, 115 U.S. 620 (1885), in which the Court held that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations." *Chase Securities Corp.*, 325 U.S. at 311.

The Court based its holding on the nature of statutes of limitation, which it described in the following, widely-quoted language:

> Statutes of limitation. . . are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (citation omitted). They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. . . .Their shelter has never been regarded as. . . a 'fundamental' right. . . the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 314 (emphasis added). The Court then pointed out that *Campbell v. Holt* adopted the view that "as a matter of constitutional law, statutes of limitations go to matters of remedy, not to destruction of fundamental rights," a distinction that emphasizes "the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Id.* The Court therefore held that "the existence of the policy at the time the action was commenced did not . . . give the [defendant] a constitutional right against change of policy before final adjudication". *Id.* at 316.

Chase Securities was explicitly approved in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the case on which Richards founds her argument. After holding that an injured employee who had never had an opportunity to be heard on her employment discrimination claim was deprived of Due Process, the *Logan* Court went on to write that

> [o]bviously, nothing we have said entitles

> every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, cf. *Chase Securities Corp. v. Donaldson*, 325 U.S. at 314-316 . . . or, in an appropriate case, filing fees. *United States v. Kras*, 409 U.S. 434 (1973). And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co. v. Arkansas*, 212 U.S. at 351; *Windsor v. McVeigh*, 93 U.S. at 278.

Logan, 455 U.S. at 437.[5] Under *Logan* and *Chase Securities*, a cause of action is, of course, a species of property entitled to Due Process protection. Nonetheless, until that cause of action has reached "final adjudication", *Chase Securities*, 325 U.S. at 316, it is subject to intervening changes in procedural rules that may, consistent with Due Process, terminate the "right to adjudication" of the claim. *Logan*, 455 U.S. at 437.

Campbell v. Holt and *Chase Securities* both relied on the distinction between a cause of action that "has not invested a party with title to real or personal property" and one that has reached "final adjudication". *Id.* at 311, 316. Richards, however, contends that unadjudicated causes of action like her own should be treated like final judgments (and, apparently, other forms of property as well) for Due Process purposes. As *Chase Securities* recognizes, however,

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[5] This Court also reaffirmed the holding of *Chase Securities* in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers*, 429 U.S. 229, 244 (1976).

this proposal is unworkable because of the need for flexibility in matters of judicial procedure, which, as a purely practical matter, can affect only those causes of action that have not been finally adjudicated; final judgments, like other forms of property, are unaffected by changes in procedural rules such as statutes of limitations.

Richards' attempt to find a conflict among the lower court rulings on the issue of "vesting" is based on the same misconception. The cases Richards reads as holding that the property interest in a cause of action does not vest, for Fourteenth Amendment purposes, until final, unreviewable victory (the "final victory" cases)[6], are entirely consistent with the approach taken in *Campbell* and *Chase Securities* and approved in *Logan*. The "final victory" cases treat non-final claims in the same way *Chase Securities* did, holding that changes in state limitations rules may be applied to pending cases without offending the Fourteenth Amendment. The "vesting" language in these cases that is emphasized by Richards merely follows the distinction employed in *Chase Securities* between the intangible property interest in a cause of action and the more tangible interests in, for example, real property or a judgment for damages.[7] These latter interests are different simply because they are beyond the reach of procedural contingencies such as statutes of limitations or

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[6] These cases are *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989); *Konizeski v. Livermore Labs*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986); and *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla.1987) *cert. denied*, 485 U.S. 1000 (1988).

[7] Richards concedes in her Petition that a final, unreviewable judgment for damages is a more tangible property interest than a simple cause of action. Petition at 8-9.

filing fees, to which non-final claims are subject. *See, e.g., Konizeski*, 820 F.2d at 989. The putative "final victory" cases merely follow *Campbell v. Holt* and *Chase Securities* in recognizing this distinction and adjusting Due Process scrutiny in light of the need for flexibility in matters of remedy, as opposed to fundamental rights. *Id.* Since, as a matter of policy, procedural rules must remain flexible, they are, in the language of *Chase Securities*, 325 U.S. at 314, matters of legislative or judicial grace rather than constitutional right. Consequently, a state's power to terminate the right to adjudicate a cause of action by changing a procedural rule is unlimited by the Fourteenth Amendment. These cases, therefore, neither contradict the view of property in *Logan* nor overextend that taken in *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) and *Duke Power Co. v. Environmental Study Group, Inc.*, 438 U.S. 59 (1978).

It is also incorrect to suggest that the "final victory" cases conflict with the approach taken in such cases as *Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441 (5th Cir. 1991); *Williams v. Hofley Mfg. Co.*, 424 N.W.2d 278 (Mich. 1988), *appeal dism'd*, 489 U.S. 1001 (1989); *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986); and *Black v. Ball Janitorial Service, Inc.*, 730 P.2d 511 (Okla. 1986), since these latter cases do not involve issues of retroactive application of intervening changes in the law. These cases thus implicate very different Due Process concerns from those that involve issues of retroactive application of law. These cases are distinguishable from, not inconsistent with, the "final victory" cases.[8]

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[8] The lower court cases considering this issue are reconcilable on the additional ground that each litigant affected by an intervening change in law actually received all the process due under the Fourteenth

Richards has not cited a single case from any court, federal or state, that upheld a challenge to retroactive application of a statute of limitations or other procedural requirements, on Due Process grounds, in conflict with *Logan*. This is simply because the issue is well settled and, at least since *Campbell v. Holt* (1885), has ceased to be a matter of any controversy among state or federal courts.

Besides being well-settled, the issue presented is of no national importance. As the cases discussed above reflect, the issue is one of state discretion, not Due Process. In addition, the choice between retroactive and prospective application of a change in the law will affect only a small portion of cases affected by the change itself, that is, those cases that happen to be in the judicial process when the change takes effect. Review of the instant case thus would not advance the orderly and efficient administration of justice, in either the state or federal systems. Moreover, far from conserving judicial resources and saving time and money for litigants, granting certiorari and reversing this case would require overruling at least *Campbell v. Holt* and *Chase Securities* and disapproving several lower court rulings, creating disruption and confusion.

Amendment, having been heard before the respective court or legislature on the issue of retroactive application. *See, e.g., Central Land Co. v. Laidley*, 159 U.S. at 112; *Konizeski*, 820 F.2d at 990; *Grimes*, 930 F.2d at 444. Due Process guarantees only an opportunity to be heard, not ultimate success. *Konizeski*, 820 F.2d at 990. Reliance on this principled reconciliation of the cases is far preferable to the disruption that would be occasioned by a ruling in this case on "vesting" for Due Process purposes.

III

Any tension between *Chevron* and *Lampf* or between *Logan* and *Lampf* cannot be resolved by considering the instant case because *Lampf* and *Chevron* were decided on federal policy grounds, not the constitutional ground on which Richards relies.

Richards finds "tension" between *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *Lampf, Pleva, Lipkind, Pupis & Petigrow v. Gilbertson*, ____U.S.____, 111 S. Ct. 2773 (1991), and requests that this Court review the instant case so as to resolve this tension. Even if there is in fact some conflict between these decisions, the case before this Court is not an effective vehicle to settle the controversy because that issue is not properly before this Court.

As Richards concedes, *Chevron*; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ____, 111 S.Ct. 2439 (1991); *American Trucking Assn. v. Smith*, 496 U.S. 167 (1990); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473 (1981); *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268 (1969); and *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) considered the issue of retroactive application of federal judicial decisions or statutes only as a matter of federal policy.

Lampf, on the other hand, merely resolved a federal limitations question and, without discussing the *Chevron* standards, applied the new rule retroactively. Thus, resolution of the only issue Richards seeks to raise here, *i.e.*, the constitutional limits on a state's power to apply limitations decisions retroactively, would have no effect on the issues of federal policy decided in *Chevron*. Granting

certiorari in this case would not, logically, give this Court an opportunity to address itself either to the viability of the *Chevron* standards or to the silence of *Lampf* with respect to those standards, or to resolve any tension that might exist between the two. In deciding the instant case, any pronouncements the Court might make with respect to *Chevron* or *Lampf* would be pure dicta. Thus, Richards' contention that this Court could resolve open issues of federal policy by considering the issue of Due Process limits on retroactive State decisions is incorrect.

Further, Richards experienced not unfairness, but at most the retraction of a windfall. As she concedes, Richards filed this "bad faith" suit when no such cause of action existed in Texas. Thus, she had no reasonable expectation that her theory would be given credence in the first place. A rational evaluation of her chances, in fact, would have recognized that, based on the law as it stood at filing,[9] her suit was barred when filed more than two years after it accrued.[10] From any perspective, Richards' suit was a

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[9] As the Court of Appeals recognized, the general rule at the time Richards filed her suit was that a cause of action accrues for limitations purposes at the time facts come into existence that authorize a claimant to seek a judicial remedy. *Liberty Mutual v. Richards*, 810 S.W.2d at 233 (*citing Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977)). Since the essence of Richards' claim was that her benefits had been denied in bad faith, it could only be concluded that limitations would be triggered on the date of such denial. Moreover, there is no unfairness where Richards had no reasonable expectancy in the viability of her suit until *Arnold* and *Aranda* changed Texas law.

[10] Richards' argument that the two year statute appeared inapplicable at the time she filed suit, Petition at 3 n.1, 16 n.6, is incorrect. Richards' pleadings expressly sought recovery for the personal injury concept of mental anguish. Appendix A1-A2. Thus, the two year statute, TEX. CIV. PRAC. & REM. CODE ANN. §16.003, Richards

gamble when it was filed in March 1986.[11]

Indeed, when *Aranda* recognized the "bad faith" theory in workers' compensation cases (and consequently required application of the *Arnold* trigger date), it appeared that Richards would receive a windfall, since her suit had been filed before the erroneous *Arnold* trigger date -- final adjudication of the underlying contract claim. When, however, *Murray* corrected *Arnold's* erroneous holding two years later, the Texas Supreme Court merely restored the law to the status quo in effect at the time Richards filed suit. Thus, what Richards claims to be "manifest injustice" is that

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Appendix at 11a, clearly applied at the time suit was filed. Obviously, this cause of action could not have been more specifically enumerated because it did not exist. Moreover, in *Arnold*, the Texas Supreme Court affirmed the applicability of the two year statute, while changing the date on which this period commences to run. 725 S.W.2d at 168. Thus, Richards was on notice from the beginning that her claim was governed by a two year limitation period. Significantly, Richards does not contend that *Arnold's* application of the two year statute was a change in the law that in any way prejudiced her rights, though she claims that at the time she filed suit the governing statute "reasonably appeared to be" the four year provision. Petition at 16 n. 6. Essentially, she concedes that she had no reasonable expectation that the four year statute applied.

[11] Richards fares no better in terms of notice even if she relies on California law, the leading body of law in the area of bad faith. At the time Richards filed suit, California adhered to a rule, identical to *Murray*, that a cause of action for bad faith accrues, and limitations commences, on the date the insured's claim is denied by the insurer. *Frazier v. Metropolitan Life Ins. Co.*, 169 Cal. App. 3d 90, 103, 214 Cal. Rptr. 883, 890 (1985); *McDowell v. Union Mutl. Life Ins. Co.*, 404 F. Supp. 136, 147 (C.D. Cal. 1975). Further, "bad faith" sounds in tort under Texas law. Under California law, a tort action for bad faith was governed by a two year, not a four year, statute of limitations. *Richardson v. Allstate Ins. Co.*, 117 Cal. App. 3d 8, 13, 172 Cal. Rptr. 423, 426 (1981).

during pendency of her claim, she was briefly the beneficiary of the fortuitous (and erroneous) change in the law which breathed life into her moribund claim (barred when filed) but was later corrected when *Murray* restored the status quo ante.[12]

The convoluted procedural history of this case makes it an inappropriate vehicle for deciding any issue of Due Process. Its unique posture would seriously limit its precedential effect. Consistent application of any principle announced would be fraught with difficulty. An area of Due Process law, exceptional for its clarity and certainty, would be subjected to the kind of confusion that has plagued the larger body of Due Process law.

Thus, the lack of any real injustice to the individual Petitioner, together with the unique procedural posture of this case, render it an inappropriate vehicle to decide any issue presented. In addition, no new or controversial issue of importance to the efficient administration of justice or other interests of national importance are presented. These circumstances dictate a denial of the Petition.

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[12] Murray herself was in the same position as Richards, having filed suit under *Robinson* and received the temporary benefit of *Arnold*. The Texas Supreme Court nonetheless applied the new trigger rule retroactively to the very case in which it was announced. *Murray*, 800 S.W.2d at 830. Thus, the Court of Appeals in the instant case had little choice but to apply the new rule retroactively. This Court, in fact, considers it erroneous not to apply a new rule of federal law retroactively when that rule was so applied in the case announcing the rule. *James B. Beam*, 111 S. Ct. at 2444, 2446.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 6, 1992

APPENDIX

A1

No. 86-14004

DOLORES J. RICHARDS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
LIBERTY MUTUAL FIRE INSURANCE COMPANY	127TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DOLORES J. RICHARDS, hereinafter called Plaintiff, complaining of LIBERTY MUTUAL FIRE INSURANCE COMPANY, hereinafter called defendant, and for cause of action respectfully show unto the Court and Jury as follows:

I.

Plaintiff is a resident of Harris County, Texas. The Defendant is a duly incorporated insurance company doing business [sic] the State of Texas where service of process may be obtained by serving the Commissioner of Insurance, 1110 San Jacinto, Austin, Texas 78701-1998.

II.

NATURE OF CASE

On or about December 23, 1981, Plaintiff was working as an employee of Federated Department Stores, Inc. in Harris County, Texas. Prior to that date, Defendant LIBERTY MUTUAL FIRE INSURANCE COMPANY had sold a policy of workers' compensation insurance to Plaintiff's employer. As a result of the relationship between Plaintiff and Defendant, the Defendant owed Plaintiff a duty of good faith and fair dealing. After Plaintiff suffered an on-the-job injury on or about December 23, 1981, Defendant received notice that Plaintiff had suffered such an injury. From that time up until the present, the Defendant has continuously refused to pay the Plaintiff any weekly benefits under the policy of workers' compensation insurance. Although the Defendant agreed to pay some of Plaintiff's medical bills prior to trial, the Defendant has continuously refused to pay all medical bills incurred since that time. As a result of the conduct of the Defendant Plaintiff has suffered damages, including, but not limited to, physical pain, mental anguish, physical impairment, and loss of credit rating.

III.

Plaintiff alleges that the conduct of Defendant as set forth above constitutes a breach of the duty of good faith and fair dealing that arises from the relationship of the parties. Such breach was done willfully and intentionally or, in the alternative, with such an entire want of care that would raise the belief that such conduct was the result of conscious indifference to the rights or welfare of Plaintiff. Plaintiff has sustained actual damages as a result of the Defendant's conduct.

IV.

ACTUAL DAMAGES

Plaintiff has suffered the folLowing actual damages as a result of the Defendant's conduct, to-wit:

a. Severe mental anguish and emotional distress,

b. Physical pain in the past, and in all reasonable probability in the future,

c. Physical impairment in the past, and in all reasonable probability in the future,

d. Loss of enjoyment of life in the past, and in reasonable probability in the future, and

e. Loss of credit rating in the past, and in reasonable probability in the future.

V.

EXEMPLARY DAMAGES

Plaintiff further seeks exemplary damages from Defendant.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays upon final trial herein, she have and recover against the Defendant in actual damages and exemplary damages in an amount in excess of the minimal jurisdictional limits of this court, together with interest on such amounts as allowed by law, for costs of court, and for such other and further relief to which Plaintiff may show herself to be justly entitled.

Respectfully submitted,
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A3

[Excerpts from Richards' Supplemental Brief]

No. 14-88-00966-CV

IN THE FOURTEENTH COURT OF APPEALS
AT HOUSTON

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Appellant,

vs.

DOLORES J. RICHARDS,
Appellee

Appealed from the 127th Judicial District Court
of Harris County, Texas

SUPPLEMENTAL BRIEF FOR APPELLEE

KIRK PURCELL
State Bar No. 16394300

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ORAL ARGUMENT REQUESTED

* * * *

REPLY POINTS

REPLY POINT ONE

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF, AND JURY RESPONSE TO, QUESTION NO. 1 CONCERNING LIBERTY MUTUAL'S BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING. (In response to Appellant's Points of Error 1-10).

REPLY POINT TWO

THE TRIAL COURT PROPERLY SUBMITTED QUESTION NO. 1 CONCERNING LIBERTY MUTUAL'S BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING. (In response to Appellant's Points of Error 11 and 12).

REPLY POINT TEN

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF, AND JURY RESPONSE TO, QUESTION NO. 5 CONCERNING THE AMOUNT OF EXEMPLARY DAMAGES. (In response to Appellant's Points of Error 39-42).

REPLY POINT THIRTEEN

MRS. RICHARDS' CLAIM OF BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING WAS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS. (In response to Appellant's Point of Error 57).

BRIEF OF ARGUMENT

* * * *

REPLY POINT THIRTEEN

MRS. RICHARDS' CLAIM OF BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING WAS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS. (In response to Appellant's Point of Error 57).

A. The Two-Year Statute of Limitations Does Not Govern

> The Murray Case Because a Cause Of Action For A Breach Of The Duty of Good Faith And Fair Dealing Is Not One Of The Actions Listed In Section 16.003(a) Of The Texas Practice & Remedies Code.

* * * *

B. The Four-Year Statute of Limitations Governs A Cause of Action For A Breach Of The Duty Of Good Faith And Fair Dealing.

* * * *

C. Any Change In The Statute Of Limitations Should Be Applied Prospectively.

Mrs. Richards filed her lawsuit in March, 1986. In *Arnold* and *Aranda* the Texas Supreme Court declared that the Statute of Limitations in "bad faith" cases did not begin to run until the underlying case was finally resolved. *See Arnold v. Nat. County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) and *Aranda v. Ins. Co. of North America*, 748 S.W.2d 210, 213 (Tex. 1988). Mrs. Richards' underlying lawsuit was finally resolved in June, 1986 when the Texas Supreme Court refused Liberty Mutual's application for writ of error. Operating under the unmistakable impression that she had filed suit within the permissible time, Mrs. Richards and her lawyer proceeded to trial in this case in June, 1988. As a matter of fundamental fairness, any change in the statute of limitations should be applied prospectively.

In *Chevron Oil Company v. Huson*, 92 S. Ct. 349 (1971), the Untied States Supreme Court addressed the question of whether a new statute of limitations should be applied non-retroactively. In doing so, the Court observed:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, (citation omitted), or by deciding an issue of first impression whose resolution was not clearly foreshadowed (citation omitted). Second, it has been

> stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation" (citation omitted). Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity" (citation omitted).
>
> Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. *Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act.
>
> * * *
>
> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was.
>
> * * *
>
> Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purposes of the Congress.

Id. at 355-56.

As a general rule, a decision of the Texas Supreme Court is to be applied retrospectively. "However, exceptions are recognized when

considerations of fairness and policy preclude full retroactivity. Resolution of the issue turns primarily on the extent of public reliance on the former rule and the ability to foresee a coming change in the law." *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). Mrs. Richards and many other injured workers have relied on the Texas Supreme Court's standard in *Arnold* and *Aranda*. It was virtually impossible for Mrs. Richards to foresee that the Texas Supreme Court would change the *Arnold-Aranda* statute of limitations formula.

Appellee respectfully urges this court to follow the reasoning of the Court in *Huson* and apply any new statute of limitations in a prospective manner. For these reasons, Appellant's appointive [sic] error 57 should be overruled.

PRAYER FOR RELIEF

For these reasons, Dolores J. Richards respectfully requests that this court affirm the judgment of the trial court, and prays for any further relief to which she may show herself to be entitled.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE,
DOLORES J. RICHARDS

[Excerpts from Richards' Application for Writ of Error in Texas Supreme Court: Complete Table of Contents]

NO. _____

IN THE
SUPREME COURT OF TEXAS

DOLORES J. RICHARDS,
Petitioner,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

On Application for Writ of Error
from the
Court of Appeals
for the
Fourteenth Supreme Judicial District

APPLICATION FOR WRIT OF ERROR

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ORAL ARGUMENT REQUESTED

* * * *

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* * * *

PRAYER FOR RELIEF

For these reasons, Dolores J. Richards respectfully requests that this Court reverse the judgment of the court of appeals and remand this cause to the Fourteenth Court of Appeals for further consideration of Liberty Mutual's other points of error. Petitioner also prays for any further relief to which she may show herself to be entitled.

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Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

(3)

No. 91-1234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. The Federal Due Process Question, Which Forms the Jurisdictional Basis for a Writ of Certiorari, Was Timely, Precisely, and Repeatedly Raised to Both the State Court of Appeals (the Court to Which a Writ of Certiorari is Sought) and the Texas Supreme Court.

Liberty Mutual's Brief in Opposition both mischaracterizes and misconstrues this Court's general rule for preservation of a federal question in state court. The rule is that a federal claim can be considered by the Supreme Court if it has been *either* raised in, *or* expressly decided by, the state court. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). If a federal point had to be *both* raised in, *and* expressly decided by, the state courts, as Liberty Mutual argues, a state court could immunize itself from Supreme Court review simply by ignoring federal issues. Thus, a state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point. Stern, Gressman, and Shapiro, *Supreme Court Practice*, 6th ed., § 3.21, at 150-51; *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). The federal question is sufficiently preserved if the necessary effect of the state court's judgment has been to deny the claim. Stern, Gressman, and Shapiro, at p. 150. This Court, therefore, has jurisdiction to decide the federal due process question involved in the present case because it was both raised by Mrs. Richards and necessarily resolved against her in the state courts.

Essentially, Liberty Mutual's argument rests on its assertion that the federal issue was waived in the state courts, thereby providing an independent state law ground for the decision and "blocking" this Court's consideration of the federal question. Yet, nowhere have the state courts found that the federal question was waived. Indeed, Liberty Mutual never argued waiver of the relevant federal question at any point before any of the state courts. Now, however, for the first time, Liberty Mutual argues that the Court of Appeals' summary rejection of

Mrs. Richards' federal due process point must have been based on a finding that the point was waived! A state court's summary denial of a properly raised federal claim, however, is necessarily a rejection of the federal question on the merits and necessarily *not* a finding that the point was "waived." *See* Stern, Gressman, and Shapiro, at pg. 150-51. Thus, whether the state courts' summary denial of the federal claim was based on the merits or, rather, based on a procedural default, ultimately turns on whether the federal question was properly raised.

The decisive consideration as to whether a federal question was sufficiently and properly raised is whether the record as a whole shows "either expressly or by clear intendment," that the federal claim "was brought to the attention of the state court *with fair precision and in due time.*" *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (emphasis added). The clear concern is that the state court have a fair opportunity to avoid the alleged federal error. The record in the present case demonstrates that the federal question was precisely and timely raised to the state courts, thereby providing ample opportunity for the state courts to correctly resolve those claims.

A. *The federal due process question was precisely and timely raised to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.*

Contrary to Liberty Mutual's assertions, the federal due process question involved in this case was sufficiently timely and precise under both Texas state procedure and this Court's requirements for certiorari jurisdiction.

Liberty Mutual claims in its "statement of the case" that Mrs. Richards' first opportunity to raise the federal question was in supplemental briefs filed in the Court of Appeals just before oral argument. Nowhere have they explained how that is in any way legally significant. Nor do they argue anywhere that the issue was not timely raised before the Court of Appeals. The absence of such

an argument is itself revealing. Indeed, raising the federal due process claim in the Motion for Rehearing (*See* Petition for Cert., Appendix, at 5a-6a.) adequately preserved the point according to well-settled state procedural law. Where the error originates at the court of appeals, as is alleged in this case, all that is necessary to preserve the point for further appeal in state court is to raise the point of error in a motion for rehearing. Wicker, Jeremy C., 31 Texas Practice § 855 (1985); *Nagle v. Nagle*, 633 S.W.2d 802 n.2 (Tex. 1982) (McGee, J., concurring). The appellate briefs are for the purpose of complaining about *trial court* error; a motion for rehearing is the appropriate vehicle to complain about *appellate court* error. Moreover, a motion for rehearing which complains, not of trial court error, but of appellate court error, falls squarely within Texas' relatively liberal view of the scope of issues permissibly raised in a motion for rehearing—i.e., "any matter determined by a court of appeals." *Tex.R.App.Pro.* 100(a). Additionally, since the essence of a due process claim is a *deprivation* of a protected interest, it is difficult to see how such a claim could ripen until the deprivation, which did not occur here until the court of appeals destroyed Mrs. Richards' cause of action by retroactively applying a change in limitations law. In sum, there is little doubt that the federal question was timely raised in the Court of Appeals, the court to which the writ of certiorari should issue.

Raising the federal question in the Motion for Rehearing not only provided the court of appeals a fair and timely opportunity to resolve the issue, but the point of error was also sufficiently precise to alert the court as to the nature of the federal claim. Nevertheless, Liberty Mutual's brief asserts that the federal point was insufficiently precise on the ground that it was supported by neither argument nor authorities. That is blatantly untrue. The point of error in the Motion for Rehearing expressly states: "The Court of Appeals erred in holding that the statute of limitations barred Mrs. Richards'

cause of action, because the retroactive application of a new statute of limitations standard deprived Mrs. Richards of the due process of law guaranteed by the Fourteenth Amendment to United States Constitution. . . ." *See* Petition for Cert., Appendix, at 6a. Thus, the point of error clearly identifies not only the error, but also the legal argument in support of the error, and the legal authority (the Fourteenth Amendment) that supports the argument. No more is required. The cases cited at page 7 of Liberty Mutual's brief are transparently inapposite. For example, in *Martin v. Cohen*, 804 S.W.2d 201, 202 (Tex.App. 1991, no writ), the court ruled that an appellant's point of error was insufficiently precise because it was merely a general assertion that granting appellee's motion for summary judgment was error. The point of error in *Martin* specified *no reasons* for such a conclusion *nor any law* that supported such a conclusion. Unlike the point of error in the present case, the point in *Martin* was a conclusion without more. The same is true of *Houston Lighting v. Klein Independent School District*, 789 S.W.2d 508, 514 (Tex.App.-Houston [14th Dist.] 1987). Moreover, the specific Texas procedural rule on motions for rehearing—*Tex.R.Crim.App.Pro.* 100 (a)—requires only that the point relied on for the rehearing be "distinctly specified." There is no further requirement. In short, there is nothing in Texas law or procedure that prohibits a litigant from making a self-contained argument in a lengthy point of error that includes not merely a conclusion but, additionally, a legal reason supporting the conclusion, and the identification of a specific law that was violated—here, the Fourteenth Amendment Due Process Clause. Liberty Mutual's argument, if accepted, would require a state litigant to preserve not only federal questions for Supreme Court review but also specific precedent. As this Court has recognized, however, litigants are not bound to follow any particular form of words or phrases in raising federal issues in state court. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). And, ultimately, whether a federal point was adequately raised in the state courts is itself

a federal question. *Street v. New York*, 394 U.S. 576, 583 (1969). Liberty Mutual's hypertechnical reading of state law requirements for preservation of federal error, if accepted, would unduly frustrate this Court's certiorari jurisdiction.

For the foregoing reasons, the federal question was precisely and timely raised in the Court of Appeals, thereby providing ample opportunity for that court to correctly resolve the claim.

B. *The federal due process issue was precisely and timely raised to the Texas Supreme Court on Application for Writ of Error and, further, in Richards' Motion for Rehearing.*

Liberty Mutual nowhere argues that federal questions, if raised on application to the Texas Supreme Court for writ of error, are untimely. Rather, Liberty Mutual again quibbles about the precision with which the federal issue was raised. Nevertheless, as previously demonstrated, the United States Supreme Court requires no particular incantation of words or phrases to raise a federal question. *See Eddings v. Oklahoma*, 455 U.S. at 113-14 n.9. Rather, it is essential only that the litigant bring the federal claim and grounds therefore to the state court's attention with fair precision. *See* Stern, Gressman, and Shapiro, § 3.20, p. 146. As the Court stated in *Eddings*, 455 U.S. at 113-114 n.9, "our jurisdiction does not depend on citation to book and verse." This is particularly true when due process issues are involved. *See* cases collected at Stern, Gressman, and Shapiro, § 3.20, p. 146-147. For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978), an objection invoking "fundamental principles of judicial fair play" was ruled sufficient to alert the trial judge to petitioner's reliance on due process principles even without explicit reliance on the Fourteenth Amendment. In the present case, Richards' Application to the Texas Supreme Court for Writ of Error expressly characterizes the retroactive application of the new limitations ruling as "[contrary to] considerations of fairness and public

policy," "fundamentally unfair," and "result[ing] in injustice." Application for Writ of Error, at p. 17, 20, 23. Moreover, the Application for Writ of Error complained that such retroactivity deprived Mrs. Richards of a "vested right," citing in support of that argument *Mellinger v. City of Houston*, 3 S.W. 249 (Tex. 1887), where the Texas Supreme Court recognized that the retroactive application of a statute of limitations which extinguishes a vested property interest violates the Due Process Clause of the Federal Constitution. *Id.* at 251-252. Moreover, due to the broad scope of issues permissibly raised in motions for rehearing pursuant to *Tex.R.App.Pro.* 100(a), Mrs. Richards' Motion for Rehearing, which expressly and precisely raised the Fourteenth Amendment Due Process question, was also sufficient—both in time and precision—to present the issue to the Texas Supreme Court.

In sum, the record as a whole clearly shows, as required by this Court's opinion in *Zimmerman*, that the federal claim was brought to the attention of the state courts—both the court of appeals and the Texas Supreme Court—with fair precision and in due time. Any allegations that the state courts were unaware of the claim or did not have a fair opportunity to decide it are specious and disingenuous. Therefore, this Court has certiorari jurisdiction to decide the federal due process question.

II. Far From Being Well-Settled for Over a Century, the Supreme Court has Never Ruled, as Liberty Mutual Claims in its Brief, that a State has Unlimited Authority to Retroactively Apply Changes in Procedural Law That Terminate a Litigant's Constitutionally Protected Property Interest in a Cause of Action.

Liberty Mutual's assertion that this area of due process is exceptional for its clarity and certainty is undercut by its own confusion about the issue, evidenced by its misreading of case law and misunderstanding of relevant due process principles. Although Liberty Mutual concedes that a cause of action is "property" protected by the Fourteenth Amendment, its brief later concludes, at

page 14, that a state's power to terminate that due process protected interest is unlimited—i.e., that the Due Process Clause places no barriers on the state whatsoever! In the same breath, Liberty Mutual contends that such a view is not inconsistent with *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Quite the contrary, such an untenable view of state power—that it automatically and without exception trumps constitutional rights—would not only render *Logan* hollow and meaningless, but it constitutes a fundamentally flawed view of how the Constitution works.

Liberty Mutual's confusion can be traced to its failure to comprehend *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). First, the cases cited at page 9 of Liberty Mutual's brief, including *Great Northern Railroad Co.*, stand only for the unremarkable proposition that the retroactive application of judicial rulings generally poses no constitutional problems. Retroactive application of judicial rulings is neither per se compelled nor prohibited by the Federal Constitution. *Great Northern*, however, in no way involved the retroactive destruction of a litigant's vested property interest in an accrued cause of action. Moreover, this Court's opinion in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), held only that a *defendant* has no due process interest that is affected by a state court's retroactive application of a change in the law which expands the relevant statute of limitations. As quoted in Liberty Mutual's own brief, *Chase* stated, in reference to statutes of limitations, that "their *shelter* has never been regarded as . . . a 'fundamental' right . . . ." *Chase Securities*, 325 U.S. at 314 (emphasis added). Statutes of limitation, of course, only shelter *defendants* and, because limitations periods are by definition arbitrary, a defendant has no interest of a constitutional magnitude in seeing that the period remains unchanged. *See id.* The present case, however, involves not a civil *defendant* but a *plaintiff*. It is important to note that

it is not the *defendant*, but rather the *plaintiff* who is vested with a due process property interest. In other words, the cause of action, which this Court in *Logan* expressly recognized as a species of "property", 455 U.S. at 428, belongs to the plaintiff and not the defendant. Thus, *Chase Securities* contradicts neither *Logan* nor any other proposition in Mrs. Richards' Petition for Certiorari. And *Chase Securities* in no way decided the issue involved in the present case—i.e., whether the retroactive application of a changed limitations period violates the Due Process Clause when it deprives a litigant of her cause of action. Additionally, Liberty Mutual undercuts its own argument with a further quote from *Chase*, in which the Court stated: "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations. . . ." 325 U.S. at 311 (*citing Campbell v. Holt*, 115 U.S. 600 (1885). Thus, *Chase* implicitly recognized that, where a property interest *is* affected by retroactively applied changes in law, there are due process implications—that is, the state's deprivation must be consistent with the Fourteenth Amendment. And, once again, although a *defendant* may not have a property interest that is affected by changes in procedural law, a *plaintiff* certainly does, in light of *Logan*.

Liberty Mutual's reading of *Logan* is nothing short of extraordinary. According to Liberty Mutual, at page 14 of their brief, a state's power to terminate a cause of action by changing a procedural rule is unlimited by the Fourteenth Amendment. This flies directly in the face of *Logan* and renders meaningless the constitutionally protected interest recognized in *Logan*. What *Logan* says, as quoted at page 12 of Liberty Mutual's brief, is that "[t]he State may erect *reasonable* procedural requirements for triggering a right to an adjudication, [including] statutes of limitations" and that "the State accords due process when it terminates a claim for failure to comply with a *reasonable* procedural or evidentiary rule." *Logan*, 455 U.S. at 437 (emphasis added). The clear im-

plication of that quote is that procedural requirements *not* reasonably applied may violate due process; and Mrs. Richards' claim in this case is that the retroactive destruction of her property interest is not a reasonable application of a procedural requirement and, therefore, cannot survive due process scrutiny.

We wholeheartedly agree that until a cause of action becomes a "final victory" it is subject to intervening changes in procedural rules *which are consistent with due process*. The retroactive application of a change in the limitations period, however, is not consistent with due process (or, at least, that is the issue that Mrs. Richards is asking this Court to decide). Moreover, contrary to Liberty Mutual's assertions, we are not contending that owning a cause of action is the same as owning a final victory, just that a cause of action vests as a property interest prior to final victory—i.e., at the time the cause of action accrues—such that any state deprivation of that interest necessarily implicates due process concerns and must, therefore, pass due process scrutiny.

Ultimately, Liberty Mutual's confusion (and virtually every argument in its brief) can be traced to a fundamental misunderstanding of a simple constitutional point. Due Process analysis involves two distinct steps: (1) whether the state action deprives the individual of an interest protected by the Due Process Clause, thereby requiring due process scrutiny; and (2) if so, whether that state action ultimately survives due process scrutiny. With respect to the first step, a state's destruction of a property interest, such as a cause of action, necessarily implicates due process scrutiny. The first question presented in the Petition for Certiorari would require this Court to decide *when* that cause of action vests as due process "property." On that point, as demonstrated in the petition, there is a sharp split in the lower courts, and one of the views—the only view under which the state of Texas could destroy Mrs. Richards' cause of action without implicating the Due Process Clause—is a view that is fundamentally inconsistent with *Logan*. With re-

spect to the second due process "step", it is certainly the case that the retroactive application of a judicial ruling —perhaps even one that destroys property interests—does not *always* violate due process. But this Court has never decided exactly how that issue is to be decided, what the rules are, or, more specifically, how much process is due. At some point, retroactive application of judicial changes in procedural law is simply unsupported by state interests that are sufficiently important to justify the deprivation of a constitutionally protected interest. As this Court recognized in *Chase Securities*, 325 U.S. at 314, statutes of limitation are, by definition, "arbitrary". That language suggests that a state may have a difficult time identifying an interest sufficient to justify the application of these arbitrary periods in such a way as to defeat vested property rights. Although this Court has decided the retroactivity issue as a matter of federal policy (that changes in limitations periods should *not* apply retroactively), it has never decided the issue as a matter of federal constitutional law. As the Court emphasized in *Logan*, although a state may elect not to confer a property interest in the first instance, the adequacy of procedural safeguards for deprivation of such an interest, once conferred, must be analyzed in constitutional terms. 455 U.S. at 432. This case provides a unique opportunity to do so.

In sum, we are not asking this Court to overrule *Great Northern Railway*, *Chase Securities*, or any other "well-established precedent." And, far from creating confusion, a clear determination of the due process issues involved in this case would resolve many unsettled and important issues that have generated confusion and conflicts in the lower courts. For all these reasons, and additionally for the reasons stated in the Petition for Certiorari, petitioner respectfully urges the Court to grant a writ of certiorari.

Respectfully submitted,

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